



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

March 9, 2015

PR 15-10

Ms. Alexis Saunders

Re: Saunders v. Rhode Island Division of Lotteries

Dear Ms. Saunders:

The investigation into your Access to Public Records Act ("APRA") complaint filed against the Rhode Island Lottery Commission¹ ("Division") is complete. By email correspondence dated December 3, 2014, you alleged the Division violated the APRA when it improperly denied the September 17, 2014 APRA request made by Mr. Max Siskind. It appears, although it is not certain, that you and Mr. Siskind were working together on a school project.

In response to your complaint, we received a substantive response from the Division's legal counsel, Marilyn S. McConaghy, Esquire. We set forth the relevant facts in chronological order.

In your APRA complaint to this Department dated December 3, 2014, you indicate that you are a student at the University of Maryland and that you were doing an open records request project with USA Today. The following records were sought by way of an email dated September 17, 2014, from Mr. Siskind, addressed to the Deputy Director of the Division:

"The database(s) of lottery sales and prize payments for 2008 to the present, including the following fields, if available:

For vendors: name, DBA, store ID, street address, city, state, zip code, lottery sales, revenues and winnings by game and date; commissions and bonuses.

For winners: name, address, city, state, zip code, date of win, amount of win, game, date of sale, location ticket was purchased, location ticket was redeemed."

¹ This Department was informed by the Rhode Island Lottery Commission's legal counsel that the proper name of this entity is the Rhode Island Division of Lotteries. As such, this Department's reference to this entity in this finding will be to the "Division."

This correspondence, as well as all correspondences to/from the Division, were to/from Mr. Siskind and as far as we can tell, your name does not appear anywhere within these correspondences. You indicate that you and Mr. Siskind tried contacting the Division on several occasions since September 2014. The last response you claim to have received (actually Mr. Siskind) was on November 10, 2014 from Attorney McConaghy. You indicate that Mr. Siskind has since emailed Attorney McConaghy and has received no reply.

The September 17, 2014 APRA request to the Division also sought raw data and not summary data and requested that the database(s) be provided in a portable digital format such as ascii or any spreadsheet. Approximately one hour after the APRA request was sent to the Division via email, the Deputy Director of the Division, Ms. Peg Rose, responded indicating that she would obtain an estimate of the cost for the information. On September 18, 2014, Ms. Rose again responded to Mr. Siskind and indicated that it was taking longer than expected to determine what raw data would be available. Ms. Rose indicated she would have an estimate for the time and costs by the following day.

On September 19, 2014, Ms. Rose sent an email to Mr. Siskind indicating that the information would be available in Excel format and the estimated time to produce the requested documents would be approximately 140 hours for an estimated fee of \$2,100. Ms. Rose asked Mr. Siskind how he wanted to proceed. Not receiving a reply, on September 24, 2014, Ms. Rose followed up with an email and inquired whether Mr. Siskind had made a decision on how to proceed, to which Mr. Siskind replied that he was in the process of speaking with his professor and his team to determine the next course of action.

Approximately one month later, on October 20, 2014, Mr. Siskind emailed Ms. Rose indicating, among other things:

“[w]e are not looking for anything to be compiled. We are simply asking for a copy of the database that already exists. * * * Also, the ‘reasonable actual cost’ of the records would be slim to none because * * * we aren’t requiring something to be compiled for numerous hours, we are simply requesting a copy of the database that already exists.”

On October 21, 2014, Attorney McConaghy emailed Mr. Siskind indicating there appeared to be some confusion between the original request and his understanding of the Division’s response. Attorney McConaghy further stated that the database does not reside on the Division’s system, but rather, it exists on GTECH’s system, the Division’s central system provider and that the Division can only provide this information in an Excel file in delimited format, which would require numerous hours to complete. Attorney McConaghy again reiterated that upon receipt of the \$2,100 for the estimated costs, the Division would commence with the work necessary to respond to the request. Attorney McConaghy further stated that if the actual statutorily allowed costs are less than \$2,100, you will be refunded the difference and if they are more, you would be billed for the balance.

After the lapse of another month, on November 10, 2014, Mr. Siskind emailed Attorney McConaghy stating, among other things:

“You say that the lottery’s database system is maintained by GTECH, an outside company. Rather than ask you to compile an Excel sheet for us, we would simply like to be put in contact with someone at GTECH who can help us receive a copy of your database. This should resolve any issues you are having with our request and we can work with GTECH moving forward to resolve this.”

Attorney McConaghy responded on December 4, 2014, indicating that she was following up on “numerous prior e-mails from [Mr. Siskind] to the Lottery and to [Mr. Siskind] from the Lottery.” Attorney McConaghy further stated that:

“GTECH Corporation is, by contract, the Rhode Island Lottery’s on-line vendor. * * * GTECH is not subject to the Access to Public Records Act. The Lottery would not give GTECH consent to allow a third party access to [the] Lottery’s database housed on GTECH’s system. In any event, GTECH would not allow any outside entity to have access to GTECH’s database.”²

On December 10, 2014, Mr. Siskind emailed Attorney McConaghy inquiring to whom to make the \$2,100 check payable. Attorney McConaghy responded on the same day, but no evidence or argument has been submitted to suggest that payment has been tendered.

In the Division’s response to your APRA complaint, Attorney McConaghy states:

“as of December 23, 201[4], it has been ninety-five (95) days since September 19, 2014 when the Lottery responded to Mr. Siskind’s request of September 17, 2014 and gave him the estimate of the costs to produce the documentation that the Lottery could produce in response to his request. * * * To date the Lottery has not received a check for the estimated costs of \$2,100.”

We note that you did not file any rebuttal.

In examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Division violated the APRA. See R.I. Gen Laws § 38-2-8. In other words, we do not write on a blank slate.

² We have previously stated that when public documents are maintained by a private entity or person, the APRA request must be made to the public body. See Reilly v. Providence Economic Development Partnership, PR 14-11.

The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. See R.I. Gen. Laws § 38-2-7. To effectuate this mandate, the APRA provides procedural requirements governing the time and means by which a request for records is to be processed. Upon receipt of a records request, a public body is obligated to respond in some capacity within ten (10) business days, either by producing responsive documents, denying the request with a reason(s), or extending the time period necessary to comply. Further, a public body may charge a maximum of \$15.00 per hour for search and retrieval of public records, with the first hour free, and may charge a maximum of \$.15 per page for copies of a document on common or legal sized paper. See R.I. Gen. Laws § 38-2-4(a)-(b). As part of the 2012 legislative amendment, the following language was added:

“the production of records shall not be deemed untimely if the public body is awaiting receipt of payment for costs properly charged under § 38-2-4.” See R.I. Gen. Laws § 38-2-7(b).

Pursuant to the APRA, this Department investigates complaints filed by any person or entity denied the right to inspect or access a public record of a public body. R.I. Gen. Laws § 38-2-8. Accordingly, as we noted, in Schmidt v. Ashaway Volunteer Fire Association, PR 99-21, “in order for this Department to have jurisdiction to inquire into an APRA matter, the complainant must first have requested a record from a public body, and second, the complainant must have been denied access to the requested record.” See also Orabona v. Scituate School Department, PR 10-13; Mudge v. North Kingstown School Department 2, PR 06-25. While the Division raises an issue concerning your legal standing, a serious question that we have as well, since it does not appear that you (as opposed to Mr. Siskind) made an APRA request, our finding makes it unnecessary to resolve this issue and we proceed to the merits of your complaint.

After reviewing the facts presented, we conclude that the Division did not violate the APRA. With respect to pre-payment of the fees, we have previously found that the APRA does not prohibit a public body from requesting pre-payment of fees. See Smith v. Watch Hill Fire District, PR 99-15. Moreover, ever since the 2012 APRA amendment, the APRA expressly allows an entity, such as the Division, to require prepayment for “costs properly charged” and provides that in such a case “the production of records shall not be deemed untimely if the public body is awaiting receipt of payment.” R.I. Gen. Laws § 38-2-7(b).

In accordance with R.I. Gen. Laws § 38-2-4(d), the Division provided Mr. Siskind with an estimate of the cost of the APRA request. The \$2,100 charge was based on an estimated search time of 140 hours or work. The Division also stated that this estimate was “based upon its knowledge and experience with the nature and scope of the materials * * * requested.”³ The Division also states that it had spent a significant amount of time and effort communicating with Mr. Siskind (both during and after regular business hours) advising him as to what the Division

³ The Division advises that a similar request made to another state resulted in a \$10,000 estimate to “run the report.”

could provide him. It does not appear that the estimate for the work involved was ever contested nor does it appear that you take issue with the Division's estimate.

In light of the fact that a number of different categories of documents dating back to 2008 was requested, we find nothing to suggest that this estimate violated the APRA, nor do you provide any evidence or argument that the amount charged was improper. We do note that it would have been incumbent upon the Division to reimburse you had the actual time for search and retrieval and/or actual number of copies been less than estimated.⁴ As noted above, the APRA expressly allows a public body to seek pre-payment of funds for costs associated with the searching, retrieving and copying of records prior to the commencement of the work. Since a public body can require prepayment before engaging its staff, and since we have been presented no evidence that you have prepaid for the search and retrieval of documents, or otherwise contested the estimated charges, we conclude that as a matter of law you have not been denied access.

Although the Attorney General has found no violations, nothing within the APRA prohibits an individual from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Please be advised that we are closing your file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Pinsonneault", written in a cursive style.

Lisa Pinsonneault
Special Assistant Attorney General

Cc: Marilyn Shannon McConaghy Esq.

⁴ We pause to note that you also requested that the fee be waived because the purpose for which the records were sought was "not primarily commercial." The APRA states that "[a] court may reduce or waive the fees for costs charged for search or retrieval if it determines that the information requested is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." R.I. Gen. Laws § 38-2-4(e). (Emphasis added). In this case, we cannot conclude the Division violated the APRA when it decided not to grant you a fee waiver, and also observe that the APRA allows a court to reduce or waive the costs to fulfill an APRA request, not this Department upon a citizen's complaint.